A **THE GOVERNMENT OF MALAYSIA**

v.

DIAMOND LEAGUE SDN BHD

B HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[SUIT NO: 21-13-2010-I]
9 FEBRUARY 2011

C ***CIVIL PROCEDURE:*** *Limitation of action - Recovery of tax - Application by defendant to strike out plaintiff's claim for balance of unpaid tax for years of assessment 1997-1999 inclusive of penalty for failure to pay within prescribed time - Whether claim statute-barred under Limitation Ordinance (Cap 49) (Sarawak) - Doctrine of crown*
D *immunity - Whether Ordinance applies to recovery of taxes by Government - Limitation Act 1953, proviso to s. 33(1) - Sarawak Interpretation Ordinance, s. 3(15)*

LIMITATION: *Revenue - Income tax - Application by defendant to strike out plaintiff's claim for balance of unpaid tax for years of*
E *assessment 1997-1999 inclusive of penalty for failure to pay within prescribed time - Whether claim statute-barred under Limitation Ordinance (Cap 49) (Sarawak) - Doctrine of crown immunity - Whether Ordinance applies to recovery of taxes by Government -*
F *Limitation Act 1953, proviso to s. 33(1) - Sarawak Interpretation Ordinance, s. 3(15)*

REVENUE LAW: *Income tax - Assessment - Application by defendant to strike out plaintiff's claim for balance of unpaid tax for years of assessment 1997-1999 inclusive of penalty for failure to pay within*
G *prescribed time - Whether claim statute-barred under Limitation Ordinance (Cap 49) (Sarawak) - Doctrine of crown immunity - Whether Ordinance applies to recovery of taxes by Government - Limitation Act 1953, proviso to s. 33(1) - Sarawak Interpretation Ordinance, s. 3(15)*

H

This was an application by the defendant to strike out the plaintiff's claim of RM15,830,763.64 against it for the balance of unpaid tax for years of assessment 1997-1999 inclusive of a 25% penalty for failure to pay within the prescribed time, on the ground
I that the claim was statute-barred under the Limitation Ordinance

(Cap 49) (Sarawak) ('Ordinance'). There was no denying that the plaintiff's claim herein was more than six years old. If this claim had been filed in Peninsular Malaysia, the defence of limitation would not be available because the proviso to s. 33(1) of the Limitation Act 1953 ('Act') provides that the Act does not apply to any proceeding made by the Government for the recovery of, *inter alia*, tax. Sarawak, however, has its own statute of limitation and there is no similar provision in the Ordinance. Hence, the defendant raised this issue in the present application.

Held (dismissing the application with costs):

(1) Although the Ordinance does not have a provision similar to the proviso to s. 33(1) of the Act, it would be downright absurd to say that the Government's right to recover taxes is subject to the Ordinance only for the State of Sarawak (or Sabah, for that matter) and not for the rest of the states in Peninsular Malaysia. Bearing in mind, that the Ordinance has been declared a federal law and tax is a federal matter under art. 96 of the Federal Constitution – which provides that no tax shall be levied except by authority of federal law – such absurdity should not be sanctioned by any court. The same proviso to s. 33(1) of the Act should apply to the Government in recovering taxes from taxpayers in Sarawak as it would for the other states in Peninsular Malaysia. Furthermore, there is an express provision in s. 3(15) of the Sarawak Interpretation Ordinance that embodies the principle of Crown immunity when it provides that no written law shall bind the Government unless it appears expressly or by necessary implication that the Government shall be bound by it. Thus, the doctrine in fact has the force of a written law and cannot be ignored and, being clothed with statutory power, is supreme in application. Therefore, the Ordinance does not apply to the recovery of taxes by the Government. *Ong Bee Yam v. Pengarah Hasil Dalam Negeri, Sarawak & Anor* (foll). (paras 11-17)

Obiter:

(1) Legislature should address this issue by making the requisite amendment to bring the Ordinance in line with the Act. Without that, the same issue would never cease to crop up now and again for the courts' determination – a sheer waste of judicial time that could easily be avoided. (para 17)

Case(s) referred to:
Appaya & Anor v. The Collector of Vizagapatam 4 Mad 155 ***(refd)***
Datuk Bandar Kuching Utara v. Kuching Plaza Sdn Bhd & Ors [2007] 4 CLJ 137 HC ***(refd)***
Inderchand v. Secretary of State [1941] ITR 673 ***(refd)***
Kong Ming Bank Bhd v. Sim Siok Eng [1982] 1 LNS 12 PC ***(refd)***
Nothman v. London Borough of Barret [1978] 1 All ER ***(refd)***
Ong Bee Yam v. Pengarah Hasil Dalam Negeri, Sarawak & Anor [2002] 3 MLJ 389 ***(foll)***
Province of Bombay v. Municipal Corporation of the City of Bombay [1947] AC 58 ***(refd)***
Ramesh Behari Ghose v. Union of India [1962] 45 ITR 622 ***(refd)***
Tan Sung Mooi v. Too Miew Kim [1994] 3 CLJ 708 SC ***(refd)***
Tata Iron & Steel Co v. Chief Revenue Authority ITC 206 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Federal Constitution, art. 96
Government Proceedings Act 1956, s. 45(2)(f)
Income Tax Act 1967, ss. 82, 106
Limitation Act 1953, s. 33(1)
Limitation Ordinance (Cap 49) (Sarawak), art. 97
Rules of the High Court 1980, O. 14A
Sales Tax Act 1972, s. 23(3)
Sarawak Interpretation Ordinance, s. 3(15)
Service Tax Act 1975, s. 15(3)

Code of Civil Procedure 1908 [Ind], s. 411

Other source(s) referred to:
Halsbury's Law of England, 4th edn, para 818
Kanga & Palkhivala, *Income Tax,* 6th edn, vol 1, p 953

For the plaintiff - Norhisham Ahmad SRC (Normareza Mat Rejab SRC & Wan Khairuddin Wan Montil RC with him)
For the defendant - Chan Yin Xi (Andin Linton with him); M/s Battenberg & Talma Advocates

Reported by Suresh Nathan

JUDGMENT

Rhodzariah Bujang JC:

[1] The plaintiff's claim of RM15,830,763.64 against the defendant was for the balance of unpaid tax for the years of assessment, 1997-1999 inclusive of a total of 25% penalty for the

failure to pay within the prescribed time. In their defence to the claim the defendant raised the issue of erroneous assessments which they have particularized in para. 4(a)-(b) of their amended statement of defence, ie, doubtful debts but which were classified as taxable income by the plaintiff. They have also pleaded delay in the commencement of this action given that the plaintiff's issuance of notification of civil proceedings made under s. 106 of the Income Tax Act 1967 was dated 31 January 2001 but this action was only commenced on 22 July 2010. The defendant claimed that the delay has greatly prejudiced them and is a miscarriage of justice because the defendant was only obliged, under s. 82 of the Income Tax Act 1967 to keep and retain its books and records for seven years only. The defendant counterclaims for declaratory reliefs, *inter alia*, that the doubtful debts were erroneously classified as taxable income within the audited accounts, that there are no income tax and interest on the unpaid instalments under the notice of assessments for 1997-1999 and a refund of money paid to the defendant under the said notices of assessments. In their amended defence and counterclaim, the defendant further pleaded that the plaintiff's action is statute-barred under the Sarawak Limitation Ordinance.

[2] Following that amendment, the defendant has filed an application to strike out the plaintiff's claim on the ground that it is statute-barred.

[3] There is no denying that the plaintiff's claim herein is more than six years old. If this claim had been filed in Peninsula Malaysia where the Limitation Act 1953 applies, the defence of limitation cannot be set up because the proviso to s. 33(1) thereof provides that the said Act does not apply to any proceeding made by the Government for the recovery of, *inter alia*, tax. Sarawak, however, has its own statute of limitation and there is no like provision in the Sarawak Limitation Ordinance. Hence, the raising of this issue in the application. Incidentally, neither does the Sabah Limitation Ordinance have a similar provision.

[4] The defendant's counsel in their submission first urged that in interpreting the Limitation Ordinance I must not apply English law because the Ordinance is based on the Indian Limitation Act and not on any English statutes. The Privy Council's case of *Kong Ming Bank Bhd v. Sim Siok Eng* [1982] 1 LNS 12 was cited by

them as authority for this proposition. I absolutely agree with them that the Ordinance follows that of the Indian Limitation Act 1963 but it stops there. As far as recovery of tax by the government is concerned, that is a special case in its own right. This is because of two things. First, there is a specific legislation regulating tax in India – the Income Tax Act 1961 and there are specific provisions on and the Act also provides limitation period, for the recovery of taxes. Yet, despite these clear limitation period, it was held in *Inderchand v. Secretary of State* [1941] ITR 673, *Tata Iron & Steel Co. v. Chief Revenue Authority* ITC 206, 212 and *Ramesh Behari Ghose v. Union of India* [1962] 45 ITR 622 that the Government's right to sue for recovery of the taxes may be exercised even after the period of limitation prescribed for proceedings under the Act has expired. (see Kanga & Palkhivala, *Income Tax,* 6th edn, vol 1, p. 953). Therefore, there is real danger in blindly applying the statement made by B.B. Mitra, *The Limitation Act 1963*, 12th edn 1998, which authority was submitted by the defendant's counsel, when the learned author said that the Government is not entitled to any exemption from the provisions of the Limitation Act. That broad statement may be true of other articles in the Limitation Act 1963 of India but for recovery of taxes, it cannot be accepted as stating the true position of the law. It is also to be noted that even in England, the Limitation Act 1980 does not apply to the Government in respect of recovery of taxes. (see para. 818 of *Halsbury's Law of England*, 4th edn).

[5] The second thing to remember is that collection of taxes is quite unlike any other form of revenue for the Government and cannot be equated with the collection of assessment rates by local authorities. Thus the case of *Datuk Bandar Kuching Utara v. Kuching Plaza Sdn Bhd & Ors* [2007] 4 CLJ 137 on the applicability of art. 97 of the Sarawak Limitation Ordinance on Dewan Bandaraya Kuching Utara (the local council) is of no assistance to the defendant in this case for that reason and another reason. That other reason is the issue in this application is not whether the plaintiff in this case has instituted the action within the period limited for it to do so but whether the Limitation Ordinance applies to them at all.

[6] In this regard, Ian Chin J had extensively considered the very point in *Ong Bee Yam v. Pengarah Hasil Dalam Negeri, Sarawak & Anor* [2002] 3 MLJ 389. His Lordship held that the doctrine of Crown immunity applies to answer a defence of limitation in a suit brought by the government for recovery of taxes and the doctrine is applicable based on s. 3 of the Civil Law Act 1956, s. 45(2)(f) of the Government Proceedings Act and s. 3(15) of the Sarawak Interpretation Ordinance. His Lordship further considered whether by necessary implication the Limitation Ordinance applies to the government and held that there are no provisions in the Ordinance that can be construed or that can be called in aid to imply that the Government is to be bound by the Ordinance.

[7] His Lordship reasoned that the amendment made way back in 1964 (in which the definition of 'Government' in the Ordinance was inserted into the Ordinance to mean the Government of the Federal or of any State thereof,) does not imply that the Government is to be bound by the Ordinance because in His Lordship's view that amendment was necessary to cater for items 6 and 7 of the Schedule to the Ordinance in which a limitation period of one year is given for certain actions instituted against the Government.

[8] The defendant's counsel in this case before me have submitted that this decision in *Ong Bee Yam*'s case *(supra)* was actually made *per incuriam*. Their grounds for saying so are these.

(i) if the intention of the Federal legislature is to exclude the Sarawak Limitation Ordinance from applying to the Government, it would do so expressly as was done in s. 15(3) of the Service Tax Act 1975 and s. 23(3) of the Sales Tax Act 1972 which provides in identical words as follows:

> (3) Any penalty or surcharge imposed under this Act shall, for the purposes of this Act and the Limitation Act 1953 [Act 254], the Limitation Ordinance of Sabah [Sabah Cap. 72.] or the Limitation Ordinance of Sarawak [Swk. Cap. 49], as the case may be, be recoverable as if it were service tax due and payable under this Act and accordingly section 6(4) of the Limitation Act 1953, section 3 of the Limitation Ordinance of Sabah or section 3 of the Limitation Ordinance of Sarawak, as the case may require, shall not apply to that penalty or surcharge.

A (ii) the doctrine of Crown immunity being an English principle, should be treated with caution as advised by Lord Scarman in *Kong Ming Bank Bhd*'s case *(supra)*.

(iii) there are other doctrines which argue against the application
B of the doctrine of Crown immunity such as the doctrine of equality before the law, of limitation and, of laches.

(iv) the decision failed to take into account the case of *Appaya & Anor v. The Collector of Vizagapatam* 4 Mad 155 in which the
C Madras High Court excluded the doctrine of Crown immunity with regards to the Indian Limitation Ordinance (as it was then known in 1881).

[9] I will take this last point first.

D It is to be noted that *Appaya*'s case *(supra)* is an application under s. 411 of the Code of Civil Procedure to recover the amount of court fees, not taxes and I have said earlier in this judgment that taxes cannot be equated with other levies or fees imposed by the government. The plaintiff's counsel has also submitted that this
E case decided in 1881 is no longer good authority as it has been overridden by the Privy Council in *Province of Bombay v. Municipal Corporation of the City of Bombay* [1947] AC 58 when the court held "the general principle applicable in England in deciding whether the crown is bound by a statute – that it must be
F expressly named or be bound 'by necessary implication' – applies to Indian Legislation". Although I am fully aware that the plaintiff's cited case does not concern the Limitation Act of India, what was said of the doctrine of Crown immunity is of much assistance to me and it debunks the argument of the defendant's
G counsel in their first submission that the English principle of Crown immunity does not apply to Indian legislation.

[10] Lord Du Parcq in *Province of Bombay* explained the principle of Crown immunity in these words:

H > The principle of Crown immunity that no statute binds the Crown unless it expressly states so is subject to the exception of 'necessary implication' which is to say it is manifest from the very term of the statute that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the
I > Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

[11] Now, although the Limitation Ordinance does not have a similar provision as the proviso to s. 33(1), it would be downright absurd to say that only for the State of Sarawak (or Sabah, for that matter), the Government's right to recover taxes is subject to the Limitation Ordinance whereas for the rest of the states in the Peninsular of Malaysia, it is not. Bearing in mind, that the Sarawak Limitation Ordinance has been declared a federal law and tax is a federal matter under art. 96 of the Federal Constitution which provides that no tax shall be levied except by authority of federal law, such absurdity is one which no court should sanction. Lord Denning in *Nothman v. London Borough of Barret* [1978] 1 All ER held that:

> Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good senses to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.

This statement of the law was applied by the Supreme Court in *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708. No doubt Parliament in this case has not reacted to addressing the deficiency in the Ordinance, but I should not, to paraphrase the words of Lord Denning in *Nothman*'s case again *(supra)*, just wrung my hands or folded them in despair and say 'There is nothing I can do about it'.

[12] In my view, by necessary implication given that, and I stressed, tax is a federal matter, the same proviso should apply to the Government in recovering taxes from taxpayers in Sarawak as it would for the other states in Peninsular Malaysia.

[13] Furthermore, and in this lies the strength of my conviction, there is an express provision in s. 3(15) of the Sarawak Interpretation Ordinance that embodies this principle of Crown immunity when it provides as follows:

> (15) No written law shall be binding on the Government unless it appears expressly or by necessary implication that the Government shall be bound by it.

By this sub-section, the doctrine in fact has the force of a written law which I just cannot ignore.

[14] In respect of the argument that there are other doctrines which militate against the Government in this case, it is obvious that the doctrine of Crown immunity, clothed with statutory power would render all the other doctrines, such as that of equality before the law, superfluous. It is supreme in application and superior to the others because to hold otherwise would be to render it virtually useless and that would be contrary to said s. 3(15).

[15] In saying all this I have made my views clear that I agree with the decision of Ian Chin J in *Ong Bee Yam*'s case *(supra)* and with all due respect to the defendant's counsel, the decision was not *per incuriam* as His Lordship's deliberations on the non-applicability of the Ordinance on the Government for recovery of taxes was the very issue raised in the case tried by him.

[16] The further argument of the defendant's counsel that since item 5(c), item 6 and item 7 of the Sarawak Limitation Ordinance contains express provisions on the Government, therefore the absence of any provision on the inapplicability of the Ordinance against the Government for recovery of taxes cannot hold water for the very same reasoning I have just made above.

[17] I have in the early part of this judgment expressed caution on the application of Indian case authorities and legal opinion in respect of this issue and having further elaborated on and considered the issue further that caution is crystallized into this conclusion – that the Limitation Ordinance does not apply to the recovery of taxes by the Government. I feel compelled, however, to express this final view on the issue. *Ong Bee Yam*'s case *(supra)* was decided in 2002. In the intervening years there are two other cases that I personally know of where the same issue of limitation were raised: this case and the other is Suit No. 22-77-2005-II *Government of Malaysia v. Margaret Au Nyat Fah*. In the former case, I was asked to determine the same issue of limitation in an O. 14A application filed by the Government and which decision was delivered together with this ruling of the even date. I am at loss as to why no legislative will was brought to bear to address this issue by making the requisite amendment to bring the Sarawak Limitation Ordinance in line with the Limitation Act 1953 as without it and without the appellate court's decision, this same

issue would never cease to crop up now and again for the courts' determination – a sheer waste of judicial time which could easily be avoided.

[18] For the earlier reasons stated above, the defendant's application is dismissed with cost of RM5,000.